SOLAIAPPAN & ORS. v. LIM YOKE FAN & ORS.

[O.C.J. (Raja Azlan Shah J.) February 3, 1967]

[K.L. — Civil Suit No. 1463 of 1966]

Companies — Directors — Election — General meeting — Deadlock concerning election of directors — Meeting continued under abnormal and unreasonable circumstances — Chairman refusing to take the chair — Election of new chairman — Whether there was duress or undue influence — Companies Act, 1965, ss. 3(2), 128 & Table A of 4th Schedule.

The plaintiffs were elected directors of a public road transport company at an annual general meeting. The annual general meeting was held at 8.30 p.m. on September 30, 1966 and continued to the following noon of October 1, 1966. At about 3 a.m. of October 1, there was a deadlock concerning the election of directors. The two solicitors who attended the meeting left and others did likewise. Some of the shareholders slept in the premises while some went out for tea. The meeting was never formally adjourned although there was a suggestion by the chairman that as the meeting had gone on for such length of time without any decision having been reached it should be adjourned. The plaintiffs and their supporters objected to such adjournment, demanding that the meeting should only end after the election of directors. They appeared to be persistent in their demand for they refused to allow the buses to take to the road at 6.15 a.m. unless their resolution was carried out. There was evidence that a bus was placed in the gateway so as to prevent the other buses from leaving the premises, and no one dared to remove it. Although there was no violence, the state of affairs was chaotic and it continued until 12 noon on October 1, when the presiding chairman declined to take the chair any further and left. A director *L*, was roused from his sleep at 12.15 p.m. by the plaintiffs, and the first plaintiff proposed him as chairman and the proposal was carried. He took the chair and it was then that the present plaintiffs were unanimously elected directors. There were two issues for the determination of the court — (a) whether the plaintiffs were properly elected directors at the said annual general meeting and (b) if they were so elected whether such election was invalidated by reason of duress and undue influence.

Held: (1) in the circumstances of the case the appointment of the directors was not proper and valid because section 128 of the Companies Act 1965 was not complied with;

(2) there was duress and undue influence because the meeting was held under pressure in abnormal and unreasonable circumstances and it was clear that one party exercised domination over the minds and wills of the other so that their independence of decision was substantially undermined.

Cases referred to:—

(1) *Re Ovens & King Traders Pty. Ltd.* [1949] V.L.R. 16.

(2) *Ashbury Railway Carriage & Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653.

(3) *James* v. *Evening Standard Newspaper Co. Ltd.* (1895), 21 V.L.R. 399.

(4) *Flitcroft's Case* (1882), 21 Ch. D. 519.

(5) *Payne* v. *The Cork Co.* [1900] 1 Ch. 308.

(6) *Peveril Gold Mines Ltd.* [1898] 1 Ch. 122.

(7) *Anderson's Case* (1877), 7 Ch. D. 74.

CIVIL SUIT.

S. Selvarajah and *R. Padmanabhan* for the plaintiffs.

Morris Edgar and *Albert S. F. Lian* for the defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: Insofar as the pleadings that are contained in the statement of claim are concerned, they have been admitted by the defendants save that they say that the appointments of the directors were not properly made, and alternatively the appointments were made under duress and undue influence. Therefore, the issues before the court are two-fold. Firstly, whether the plaintiffs were properly elected directors at the annual general meeting held on 30th September, 1966. Secondly, if they were so elected, whether such election was invalidated by reason of duress and undue influence.

I now consider the first issue. In order to do that it is proper to look at the relevant articles of association. Before an annual general meeting is to be validly held, seven clear days' notice to members is required by the articles of association (see article 47). Any member entitled to be present and vote at the meeting may submit any resolution to such meeting provided that at least three days before the day appointed for the meeting he shall serve upon the company a notice in writing signed by him and containing the words of the proposed resolution and stating his intention to submit the same (article 49). If such notice is received before the issue of the notice calling for the meeting, it must be included in the notice. In any other case it must be issued as quickly as possible (article 50).

Pausing there for a moment, it is clear from the evidence that the notice calling for the annual general meeting was dated 8th September, 1966 and it is not disputed that article 47 has been complied with. It is also not disputed that the notice of the proposed resolution by Solaiappan dated 26th September, 1966 reached the company three days before the appointed day. Article 49 has also been complied with. Since the said notice was not received by the company before the issue of the notice calling for the meeting it was not included in that notice. In the circumstances the company was required to issue it to members as quickly as possible. That was not done.

Continuing with the relevant articles of association, article 51 provides that except for the sanctioning of dividends, the consideration of accounts, balance sheets, the ordinary report of the directors, and election of directors and auditors, all other business is deemed to be special business. Article 54 provides that the chairman may with the consent of the meeting adjourn it from time to time, and article 55 enables one of

the other directors present at the meeting to preside if the chairman declines to do so. Article 57 requires the minutes of the proceedings of every general meeting to be signed by the presiding chairman, and the same shall be conclusive evidence of such proceedings and of the proper election of the chairman.

With regard to the appointment of directors, article 72 provides that one-third or the number nearest to one-third shall retire but shall be eligible for re-election. Article 74 enables the company to alter the qualifications and number of directors and also provides for their removal.

It is clear from article 1 of the company's articles of association that Table A in Schedule B of the Companies Enactment (Cap. 58 of the revised edition) was not adopted by the said company. Cap. 58 has subsequently been succeeded by the Companies Ordinances 1940-1946. These in their turn have now been superceded by the Companies Act, 1965. Under the transitory provisions of section 3 of the Act, in particular sub-section (2) thereof, it provides for the continuity of the state of affairs existing under the repealed laws. Sub-section (2) of section 3 reads as follows:

"(2). Unless the contrary intention appears in this Act —

(a) all persons, things and circumstances appointed or created by or under any of the repealed or amended written laws or existing or continuing under any of such written laws immediately before the commencement of this Act shall under and subject to this Act continue to have the same status operation and effect as they respectively would have had if such written laws had not been so repealed or amended; and

(b) in particular and without affecting the generality of the foregoing paragraph, such repeal shall not disturb the continuity of status operation or effect of any Order in Council order rule regulation scale of fees appointment conveyance mortgage deed agreement resolution direction instrument document memorandum articles incorporation nomination affidavit call forfeiture minute assignment register registration transfer list licence certificate security notice compromise arrangement right priority liability duty obligation proceeding matter or thing made done effected given issued passed taken validated entered into executed lodged accrued incurred existing pending or acquired by or under any of such written laws before the commencement of this Act."

That section is taken word for word from section 4 of the Companies Act, 1958 for the State of Victoria. Speaking of the corresponding provision in the 1938 Act, Fullagar J. in *Re Ovens & King Traders Pty. Ltd.*[1] said at p. 21:

"The general purpose of the provision seems plainly to be to continue the state of affairs existing under the repealed Acts, but to continue it under and subject to the new Act. . . . Such provisions should, I think, be construed liberally".

It is well settled that articles of association are the company's rules of internal management and government. In *Ashbury Railway Carriage & Iron Co.* v. *Riche,*[2] Lord Cairns described the articles as definding the duties, rights and powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made. The articles are subordinate to the memorandum: *Ashbury's Case, supra,* at p. 670. It was held in *James* v. *Evening Standard Newspaper Co. Ltd.*[3] that the articles must be consistent with the Act. So the articles cannot authorise anything which is either expressly or impliedly prohibited by the Act or the memorandum or take away any right conferred by the Act on the company or the shareholders: *Flitcroft's Case,*[4] *Payne* v. *The Cork Co.,*[5] *Peveril Gold Mines Ltd.*[6] The Act and memorandum prevail in case of inconsistency: *Anderson's Case.*[7]

From this line of cases it is clear that the articles of association must be read subject to the Act, and I am of the opinion that the phrase, "unless the contrary intention appears in this Act" appearing in sub-section (2) of section 3 can import of no other construction. The somewhat lengthy argument of counsel on behalf of the plaintiffs that the companies Act does not apply to the articles is therefore not tenable.

I was referred by counsel for the defendants to the provisions of section 128 which in simple language enacts that a public company such as the one under consideration may remove a director before the expiration of his term of office by ordinary resolution but special notice of not less than 28 days is required under section 153. Counsel for the plaintiffs seemed to argue that section 128 is an enabling section, that is, to make it easier to remove directors from office. He took the view that section 128 does not invalidate the articles of association because of the interpretation afforded by sub-section (2) (b) of section 3 of the Act. He based his reasoning on the hypothesis that if a company adopts Table A of the new Act there will always be articles to which section 128 does not apply. As an illustration, counsel referred me to article 69 of Table A in the Fourth Schedule to the Act. In my view the argument is attractive but devoid of merit. The whole case boils upon the interpretation of sub-section (2) (a) and (b) of section 3 of the Act. As has been said earlier in this judgment, the general purpose of section 3 is to continue the state of affairs existing in a company under the repealed laws but under and subject to the new Act. What was the state of affairs then existing prior to the commencement of the Act? I have been told that there were 13 directors. A section of the shareholders, the plaintiffs amongst them, wanted to replace those 13 by a like number. Another section wanted to remove and appoint

only 4 of the 13 directors as required under article 71. What actually happened? The first-named plaintiff sent in a notice of resolution proposing to remove all 13 directors and to appoint the same number. In other words, this plaintiff, in addition to the proposal to remove 4 directors which he could validly do under the articles, wanted to remove the remaining 9 directors who, under the articles, were still in office. Had the new Act not been passed I think he could have succeeded because under the Companies Ordinances 1940-1946 there was no corresponding section to section 128 of the new Act. With the coming into force of the new Act we have a new section, that is, section 128 which expressly requires special notice of at least 28 days in order to propose the removal of a director before his term of office expires. That condition precedent, to my mind, was not fulfilled. It may also be worth noting that that section corresponds with and was taken from section 120 of the Companies Act 1958 pertaining to the State of Victoria. In Victoria too that is a new section. It was introduced in that State in the 1958 Act, having been copied from the English Companies Act 1948, section 184.

In the circumstances of this case it does seem to me that the appointment of the directors named in paragraph 10 of the statement of claim was not proper and valid.

With regard to the alternative defence I have no hesitation in coming to the conclusion that there was duress and undue influence.

It was never disputed that the annual general meeting was held at 8.30 p.m. on 30th September, 1966 and continued to the following noon of 1st October, 1966. At about 3.00 a.m. of the 1st of October there was a deadlock concerning the election of directors. The two lawyers left the meeting and others did likewise. Some of the shareholders slept in the premises while some went out for tea. The meeting was never formally adjourned although there was a suggestion by the chairman that as the meeting had gone on for such length of time without any decision having been reached it should be adjourned. The plaintiffs and their supporters objected to such adjournment, demanding that the meeting should only end after the election of directors. To my mind they appeared to be persistent in their demand for they refused to allow the buses to take to the road at 6.15 a.m. unless their resolution was carried out. There is evidence, which I accept, that a bus was placed in the gate-way so as to prevent the other 20 buses from leaving the premises. There is also evidence, which I accept, that no one dared to remove the bus which caused the obstruction. It would not be unfair to say that at that stage of the so-called meeting, to quote the words of a witness (Sim Sin Choy) there was confusion. No doubt there was no violence, but it is not difficult to imagine the chaotic state of affairs that existed unless the plaintiffs' resolution was passed. That state of affairs continued until 12.00 noon on 1st October, 1966 when the presiding chairman declined to take the chair any further and left. A director, Loh Chan, was roused from his sleep at 12.15 p.m. by the plaintiffs and plaintiff No. 1 proposed him as chairman and the proposal was carried. He took the chair and it was then that the present plaintiffs were unanimously elected directors. It may be interesting to note that the company was summoned and fined a sum of $300 for failing to run their buses on the road at 6.15 a.m. on 1st October, 1966. The company has been warned against such repetition by the Road Transport Licensing Board.

Those are the facts which I have no reason to reject. The meeting commenced at 8.30 p.m. and at 3.00 a.m. no decision was reached. In those circumstances it should have been adjourned and the articles of association provide for such contingency. However, the suggestion was contumeliously rejected by the plaintiffs and their supporters. In my view, the meeting continued under abnormal and unreasonable circumstances. It was held under pressure. To my mind, this is a clear case of one party exercising domination over the minds and wills of the other party so that their independence of decision was substantially undermined.

It was said by counsel for the plaintiffs that the present facts do not establish duress or undue influence. I disagree with him. This is a clear case of duress. This is also a clear case of undue influence. The categories of undue influence are never closed. All the circumstances of each case have to be considered to determine whether there is undue influence. For if it were otherwise, the law would fail to protect the ever-expanding interests of the community.

For the above reasons I would dismiss this case with costs.

Claim dismissed.

Solicitors: *Braddell & Ramani; Morris Edgar & Co.*

YONG MOK HIN v. UNITED MALAY STATES SUGAR INDUSTRIES LTD.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and MacIntyre J.) February 16, 1967]

[K.L. — Federal Court Civil Appeal No. X.50 of 1966]

Contract — Building contract — Entire or instalment contract — Non-completion of work — Breach — Novation — Damages — Contracts (Malay States) Ordinance, 1950, ss. 40, 63, 65, 66 & 75.

Practice and Procedure — Appeal — Point taken first time on appeal — When may be entertained.